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No. 89-237

In the Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM GEORGE PAYNE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying a waiver of deportation to a permanent resident alien found to be deportable following his conviction for possession of cocaine and marijuana.

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OPINIONS BELOW

The opinion of the court of appeals affirming the decision of the Board of Immigration Appeals (Pet. App. A1-A4) is unpublished, but the judgment is noted at 879 F.2d 863 (Table). The decision of the Board of Immigration Appeals (Pet. App. C1-C11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1989. The petition for a writ of certiorari was filed on August 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a permanent resident alien and citizen of Jamaica who entered the United States in 1971. In April 1985, he was convicted of possession of cocaine and marijuana in violation of Florida law. In February 1985, the Immigration and Naturalization Service (INS) instituted deportation proceedings against petitioner on the ground that he was deportable pursuant to 8 U.S.C. 1251(a)(11) of the Immigration and Nationality Act (Act), which provides for the deportation of any alien convicted of a state or federal controlled substance offense after entering the United States. At his deportation hearing, petitioner conceded deportability and sought a waiver of deportation pursuant to Section 212(c) of the Act, 8 U.S.C. 1182(c). Pet. App. A2, C1.

Section 212(c) gives the Attorney General discretion, with regard to a permanent resident alien who has lived in the United States for at least seven years, to admit the alien into this country notwithstanding the presence of certain stated grounds for excluding the alien under the Act. One of those grounds is that the alien was convicted of a controlled substance offense, 8 U.S.C. 1182(a)(23)(A), which is the exclusion counterpart of 8 U.S.C. 1251(a)(11). INS regulations permit an alien in deportation proceedings to make an application for a waiver of deportation to the Immigration Judge (IJ). 8 C.F.R. 212.4(d). See *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976).

Petitioner presented evidence to support his claim that the equities merited the INS's favorable exercise of discretion on his behalf under Section 212(c). Petitioner is married to a United States citizen and has six dependent children who are also United States citizens. Other close relatives of petitioner are citizens or permanent resident aliens. Petitioner has had steady employment since his

arrival in the United States and is the primary source of support for his family. Petitioner also indicated that he lacks family in Jamaica and would not be able to earn sufficient wages there to support his wife and children. Finally, petitioner noted that a physician is treating him for an ulcer. Pet. App. C6-C8.

As adverse factors, the INS introduced evidence of petitioner's drug conviction and the events giving rise to that event. The evidence indicated that petitioner had been identified by a multi-agency investigation as an operative in a drug-running organization that relied on the use of rental cars to move marijuana from Florida to Washington, D.C. Petitioner was arresteed when his rental car was stopped on a Florida highway. Upon his arrest, petitioner tried to dispose of a plastic bag of cocaine. In the trunk of the car, police found four bales (about 227 pounds) of marijuana. After his conviction by a jury for possession of cocaine and possession of more than 20 grams of marijuana, petitioner continued to assert that he did not know what was in the trunk of his car before his arrest. Petitioner also had an earlier conviction for carrying a concealed weapon (a knife). Pet. App. C5-C6.

2. The IJ denied petitioner's request for a waiver of deportation, and the Board of Immigration Appeals affirmed. After a detailed review of the record, the Board weighed the equities and agreed with the IJ that petitioner's long residence and family ties in the United States did not outweigh the serious adverse factor of his drug conviction and drug involvement. The Board stressed that petitioner had demonstrated no evidence of rehabilitation and that the amount of marijuana involved in his offense was substantial. The Board recognized that deportation will cause some hardship to petitioner, but it concluded that the responsibility for those consequences rests with petitioner. Pet. App. C8-C11.

3. The court of appeals affirmed. Pet. App. A1-A4. The court explained that under the governing legal standards, the Board's decision should be disturbed only if it is arbitrary and capricious and constitutes an abuse of discretion. Applying that standard, the court found that the Board's decision should not be set aside. After stating that the Board, in its review of petitioner's claim, had "carefully weighed [the] evidence of hardship against the serious adverse factors," the court concluded that the Board's denial of relief "cannot be characterized as an abuse of discretion." *Id.* at A3-A4.

4. Petitioner filed a petition for a writ of certiorari in this Court and sought a stay of deportation from the court of appeals pending this Court's disposition of the petition. On August 18, 1989, a circuit judge denied petitioner's motion for a stay. Petitioner then applied for a stay of deportation from this Court. On August 21, 1989, the application for a stay was denied by Chief Justice Rehnquist, and, on successive resubmissions, was denied by Justice Brennan and Justice Marshall. After resubmission to Justice O'Connor, who referred the application to the Court, the full Court denied the application on September 25, 1989.*

ARGUMENT

Petitioner contends (Pet. 15-36) that the Board of Immigration Appeals abused its discretion in concluding that the equities did not weigh in petitioner's favor in his application for a waiver of deportation. In particular, petitioner argues that the Board erred in treating petitioner's controlled substance violation (the possession of mari-

* Although no stay of deportation is currently in effect, petitioner has not been deported as of the date of filing this brief.

juana and cocaine) as a serious adverse factor requiring the showing of unusual or outstanding equities to warrant a favorable exercise of the Board's discretion. The court of appeals correctly rejected that fact-bound contention, and its holding does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

Section 212(c) authorizes the INS to exercise discretion in granting a waiver of deportation; a waiver is not available as of right to an alien who meets the minimum statutory criteria. See *Blackwood* v. *INS*, 803 F.2d 1165 (11th Cir. 1986). In exercising its discretion, the Board may properly take into account the policies embodied in the immigration laws to deny lenient treatment to drug offenders. *Id.* at 1167. In the presence of a serious controlled substance conviction, the Board has determined to require unusual or outstanding equities in the alien's favor to offset the countervailing adverse factor. *Matter of Marin*, 16 I. & N. Dec. 581, 586 n.4 (BIA 1978). That policy is not an abuse of the Board's discretion. See *Blackwood*, 803 F.2d at 1168 ("[W]e cannot say that the Board acted arbitrarily or caprciously in deciding that Blackwood's crime was not outweighed by a showing of unusual or outstanding equities."); cf. *Byus-Narvaez* v. *INS*, 601 F.2d 879, 883 (5th Cir. 1979).

Petitioner posits that in the exercise of the Board's discretion, the Board must distinguish between drug possession offenses and drug trafficking offenses, treating only the latter as "serious" drug offenses warranting a strong showing of offsetting equities. The statute, however, requires no such distinction. The ground for deportation that applies to petitioner speaks of any violations "relating to a controlled substance." 8 U.S.C. 1251(a)(11); see 8 U.S.C. 1182(a)(23) (providing the same ground for exclusion). In developing standards for waiving this ground for

deportation, the INS is entitled to conclude that a possession offense "relating to a controlled substance" is as serious as a distribution offence. Contrary to petitioner's contention (Pet. 28-29), it is entirely irrelevant that in other sections of the immigration laws, Congress determined to deny certain benefits to an alien convicted of "a particularly serious crime" (8 U.S.C. 1253(h) (governing withholding of deportation)), and defined the term "aggravated felony" to include a "drug trafficking crime" (8 U.S.C. 1101(a)(43)). The distinctions drawn in those contexts apply to specific types of benefits under the immigration laws. Congress drew no such distinctions, however, in providing the INS with discretion to waive deportation under Section 212(c).

At all events, the Board did not abuse its discretion in treating petitioner's possession conviction as a serious crime. The record in this case demonstrates that petitioner was arrested when driving a car containing 227 pounds of marijuana—an amount hardly consistent with petitioner's personal use. Moreover, the marijuana was found in the trunk of a rental car under circumstances consistent with the modus operandi of a drug trafficking network with which petitioner was thought to be associated. In light of those facts, the Board had ample justification, in accordance with its established practice, to require petitioner to demonstrate unusual and outstanding equities to warrant the special dispensation of a waiver of deportation.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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